LIBRARY
SUPREME COURT, U. S.

FILED
SEP 18 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 213

(No. 1498 October Term, 1968)

MARK L. FRANCE, Trustee,
Petitioner,

vs.

UNION BANK AND SAVINGS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION.

PAUL W. PHILIPS,
R. DAVID BOYER,
Attorneys for Respondent, Union Bank and Savings Company
Bellevue, Ohio

Of Counsel:
HELMKE, PHILIPS & BEAMS,
309 Standard Building,
Fort Wayne, Indiana 46802.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 213

(No. 1498 October Term, 1968)

MARK L. FRANCE, Trustee, *Petitioner,*

vs.

UNION BANK AND SAVINGS COMPANY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION.

AUTHORITY TO FILE

Respondent files this Supplemental Brief pursuant to the provisions of Rule 24 (5), U. S. Supreme Court Rules.

SUPPLEMENTAL AUTHORITY

On page 5 of its Brief in Opposition respondent has cited *In re: Portland Newspaper Publishing Company, Inc.*, (1967) 271 F. Supp. 395 (D.C., Ore.). That case, as of the time of the filing of Respondent's brief was on appeal to the United States Court of Appeals for the Ninth Circuit.

Subsequently, the Ninth Circuit Court of Appeals issued its decision affirming the District Court without reservation.

> **Everette H. Williams v Rose City Development Co., Inc.*, (Aug. 20, 1969 No. 22507-A, United States Court of Appeals for the Ninth Circuit (Opinion not yet published).

The Oregon District Court previously had ruled on three claims sustaining one (Rose City Development Co., Inc.) and disallowing the other two.

*The revision in title of the case results from the fact that Portland Newspaper Publishing Company, Inc. was the bankrupt, and Everette H. Williams was the Trustee in Bankruptcy.

The claimants whose claims had been denied appealed. Concurrently the Trustee appealed the decision against him and in favor of Rose City. All three claims, as below, were dealt with by the Appellate Court in Consolidation.

The Rose City claim is the only one pertinent here. In that claim, both the District Court and the Court of Appeals for the Ninth Circuit held that a security interest in accounts receivable arising after the beginning of the four months immediately prior to bankruptcy is valid against the Trustee where a security agreement covering after-acquired accounts existed and proper notice had been filed more than four months prior to bankruptcy. Both decisions hold that in such instance the "transfer" took place more than four months prior to bankruptcy, i.e. at the time the security agreement was executed and notice filed. Consequently the transfer was not for or on account of an antecedent debt. Hence, no illegal bankruptcy preference resulted.

The Ninth Circuit Court rejected the assertions by the Trustee in Bankruptcy that under § 60 of the Bankruptcy Act there can be no security interest in an account receivable until that account receivable actually exists. Citing the decision of the Seventh Circuit in the case here below, the Court of Appeals

said:

> "Congress did not state that a 'transfer' occurs when a security interest attaches or when state law says a conveyance has been made. Congress provided that a transfer is 'deemed' to have been made when it became 'so far perfected' that no subsequent lien creditor could achieve priority. 'Transfer' for the purpose of section 60a(2) is thus equated with the act by which priority over later creditors is achieved and not with the event which attaches the security interest to a specific account."

> "We look to state law, therefore, only to decide the point at which Rose City's claim to the future accounts was sufficiently asserted to prevent a subsequent lien creditor from achieving priority over it in these accounts. That time was the date which Rose City filed its financing statement. *(Grain Merchants of Indiana Inc. v. Union Bank and Savings Co., Bellevue, Ohio* (7th Cir. 1969) 408 F. 2d

209). Because Rose City filed its financing statement long before the four month period anteceding bankruptcy, its security interest is immune from the Trustee's preference challenge."

Finally, the Court went on to say:

"Rose City's floating lien on accounts receivable was easily ascertainable by any creditor who cared to look at the financing statement. After the financing statement was filed, no creditor could reasonably have been misled into believing that Rose City's receivables would provide assets to which he could look to satisfy debts incurred for subsequent extensions of credit. Neither the Bankrupt or Rose City took any affirmative action to obtain for Rose City a favored position over other creditors of its class during the four months before bankruptcy."

"Nothing in the legislative history of section 60a(2)

> suggests that Congress intended to permit a trustee to upset floating liens on accounts receivable which, as here, were automatically perfected and which involved none of the symptoms of last minute favoritism characterizing true perferences. On the contrary, the history of the section shows that Congress knew how important accounts receivable financing was to the business community, particularly to small-business men, and one of Congress' principal objectives in amending section 60a(2) was to loosen the flow of credit to small-business men whose financing had been seriously impaired by the old bona fide purchaser test."

Thus, all of the six court decisions now on record on the central issue in this case (four District Courts and two Courts of Appeals) are in complete accord as to the validity of the creditor's argument and the lack of validity of the argument of the Trustee in Bankruptcy.

Hence it is now even more clear that there exists no substantial Federal question in need of settlement by this

Court. In fact there exists no question at all. All judicial authorities and precedents are in full agreement and in accord with the ruling of the Seventh Circuit below in this case.

Respectfully submitted,

PAUL W. PHILIPS,
R. DAVID BOYER,
Attorneys for Respondent, Union Bank and Savings Company, Bellevue, Ohio

Of Counsel:
HELMKE, PHILIPS & BEAMS
309 Standard Building,
Fort Wayne, Indiana 46802.